

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

ORIGINAL

No. 76-7356

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

IN RE: MASTER KEY ANTITRUST LITIGATION

EXXON CORPORATION, ESSO EASTERN, INC., EXXON
PRODUCTION RESEARCH COMPANY, ESSO EXPLORA-
TION INC., ESSO INTER-AMERICA, INC., JAYVEN, INC.,
GILBARCO, INC., EXXON NUCLEAR COMPANY, INC.,
and EXXON RESEARCH & ENGINEERING COMPANY,
Appellants.

Consolidated Appeals from the United States District Court
for the District of Connecticut

BRIEF FOR PLAINTIFFS APPELLEES

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IN THE
UNITED STATES COURT OF APPEALS
For The Second Circuit

—————
Docket Nos. 76-7356 and 76-7379
—————

In Re: Master Key Antitrust Litigation

Exxon Corporation, Esso Eastern, Inc., Exxon Production Research Company, Esso Exploration, Inc., Esso Inter-America, Inc., Jayven, Inc., Gilbarco, Inc., Exxon Nuclear Company, Inc., and Exxon Research & Engineering Company, Appellants.

—————
Consolidated Appeals from the United States District Court for the District of Connecticut
—————

BRIEF FOR APPELLEES-PLAINTIFFS
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THE ISSUES PRESENTED FOR REVIEW

Where private antitrust class actions remain pending against two solvent defendants:

1. (a) Whether the District Court acted within its discretion in approving the interclass allocation of a partial settlement with one defendant (Emhart Corporation) where the allocation was based upon the sales records of that defendant, which records were contemporaneously kept in the regular course of business prior to the institution of

this litigation, and where no evidence to the contrary was offered by Objector?

(b) Whether class counsel representing two "ultimate purchaser-end-user" classes had a disabling conflict of interest which would invalidate an interclass settlement allocation where that allocation was not arbitrarily negotiated, but was based upon contemporaneous sales statistics of the settling defendant and where the District Court appointed additional counsel for purposes of further allocation and distribution?

2. (a) Whether the District Court acted within its discretion in approving a partial settlement with one defendant (Ilco Corporation) at a substantial discount as a result of its extremely poor financial condition?

(b) Whether the District Court acted within its discretion in relying upon the financial statements of Ilco Corporation, an affidavit by its Secretary, the repeated representations by Ilco's counsel, and the lack of defense put forward by Ilco in the litigation to find that Ilco was in sufficiently poor financial condition to justify the proposed settlement?

STATEMENT OF THE CASE

This is an appeal by Exxon Corporation and certain

of its affiliated companies (hereinafter "Objector" or "Exxon") from two District Court orders separately approving separate partial settlements with defendant Emhart Corporation ["Emhart"] and Ilco Corporation ["Ilco"] in a number of related treble damage antitrust class actions. The Emhart settlement included within its terms an allocation among the public body class (states, counties, cities and other political subdivisions) and the private plaintiff class (owner-builders of hotels, motels, apartment buildings and office buildings), with 80 percent of the Emhart settlement allocated to the public class and 20 percent to the private class. Two additional defendants, Sargent and Company ("Sargent") and Eaton Corporation ("Eaton"), have not settled. All pending cases have been consolidated for trial of the liability issues against Eaton and Sargent, presently scheduled to commence on September 14, 1976.^{1/}

This litigation, consolidated under 28 U.S.C. §1407, involves fifteen state-wide class actions on behalf of public entities, national class actions on behalf of public entities and private builder-owners, and individual suits brought by the State of New Jersey and the City of New York. The first cases were instituted in 1970 and the national classes were

^{1/}Plaintiffs have attempted to keep this date firm, despite these appeals, by moving for an expedited appeal.

certified by Judge Wood in City of Philadelphia v. Emhart Corp., 50 F.R.D. 232 (E.D. Pa. 1970). Thereafter, additional class actions were filed in other jurisdictions; all cases were transferred to the District of Connecticut for purposes of consolidated pretrial discovery. In re Master Key Antitrust Litigation, 320 F. Supp. 1404 (J.P.M.L. 1971). A motion by defendants to set aside the class certification was denied by Order of May 27, 1975. In re Master Key Antitrust Litigation, 70 F.R.D. 23 (D.Conn.), appeal dismissed, 528 F.2d 5 (2d Cir. 1975).

The settlement agreement with Emhart Corporation ["Emhart"] was entered into on June 11, 1975, after five years of intensive pretrial discovery into liability and damage issues by appellees ("plaintiffs" herein) and after disposition of crucial motions.

The settlement agreement with Ilco Corporation ["Ilco"] was negotiated in May, 1976. Negotiations were initiated as a result of the representations of Ilco, both to plaintiffs and to the District Court, that Ilco was in poor financial condition and that any judgment obtained against Ilco would be uncollectible in that it would cause Ilco to be placed in bankruptcy.

A. The Plaintiffs Pursued Extensive Pretrial
Discovery Over A Five Year Period Before
Reaching The Settlements With Emhart And
Ilco.

Settlement negotiations with Emhart were concentrated in May and June, 1975, although initial discussions took place several months earlier. Prior to any discussions of settlement, counsel for the plaintiffs accomplished the following:

(1) Propounded three sets of consolidated interrogatories upon defendants and twice moved to compel answers under Rule 37.

(2) Inspected documents at the corporate headquarters of the four defendants and the offices of the industry's three trade associations. This inspection extended over two years, and involved months of work by counsel for plaintiffs; millions of documents were reviewed and more than 30,000 documents were copied for further analysis. These records fill approximately eight file drawers.

(3) Conducted an extensive deposition program. More than thirty (30) employees and former employees of the defendants were examined. Since the settlement and

prior to the settlement hearings, additional witnesses associated with the non-settling defendants have been deposed. Likewise, employees of class representatives, contractors and potential witnesses for plaintiffs were deposed by defendants.

(4) Interviewed numerous persons in the contract hardware industry to get background for the case and locate witnesses for trial.

(5) Employed an expert witness to analyze the record, to consult with plaintiffs, and to prepare to testify at the liability trial with respect to the economic conclusions he would draw from the evidence.

(6) Subpoenaed records from various contract hardware dealers throughout the country, copying thousands of documents with respect to sales of contract hardware and master key systems.

(7) Answered interrogatories propounded by defendants and collected purchase data from plaintiffs and class members in the state-wide class actions and the nationwide public and private class actions. This material fills more than twenty-five file drawers.

(8) Interviewed state personnel and general contractors with respect to the procedures for sale and installa-

tion of contract hardware.

(9) Prepared and filed Plaintiffs' Designation of Evidence and Memorandum of Law with respect to the nature and proof of the antitrust violations committed by defendants.

Additional production of documents and depositions occurred prior to the Ilco settlement.

B. Significant Legal Issues Were Briefed And Argued By Plaintiffs And Decided By The District Court.

This litigation has involved issues of critical importance to the effective prosecution of these antitrust class actions. The following matters were resolved in the course of the consolidated pretrial proceedings:

(1) The standing of plaintiffs, as indirect purchasers, to recover damages under Section 4 of the Clayton Act. In re Master Key Antitrust Litigation, 1973-2 Trade Cases ¶74,680 (D. Conn. 1973). In support of this position, liaison counsel filed an amicus brief in the Western Liquid Asphalt Cases, 487 F.2d 191 (9th Cir. 1973), cert. denied, 415 U.S. 919 (1974).^{2/}

^{2/}Objector Exxon Corporation was a defendant in that case, and took a position with respect to "standing" which would eliminate any recovery by the class members in the Master Key litigation.

(2) The separation of liability and damage issues for consolidated trial of all cases, the proof of liability on a class-wide basis, and whether these actions may be maintained as nationwide and statewide class actions. In re Master Key Antitrust Litigation, 70 F.R.D. 23 (D. Conn. 1975). On appeal by the non-settling defendants Sargent and Eaton, the Second Circuit refused to disturb the procedural rulings by the District Court. In re Master Key Antitrust Litigation, 528 F.2d 5 (2d Cir. 1975).

(3) Numerous discovery motions, including those under Rule 37, F.R.C.P., have been decided by the District Court throughout this litigation.

C. The Settlements.

1. The Emhart Settlement

This settlement agreement provides for payment of \$7,500,000 by Emhart Corporation. (A1030). This amount was deposited in an escrow account in August, 1975. The interest earned on the settlement fund belongs to the plaintiffs and class members. The settlement fund has been invested in United States Treasury bills and presently exceeds \$8 million in amount.

The settlement amount was based upon Emhart's total

sales of contract hardware and equalled approximately 8% of those transactions over a four year period.

Emhart Corporation's sales of contract hardware stay in the case as a basis for recovery against the non-settling defendants. The other defendants thus remain responsible for the entire amount of damages. If the anti-trust violations are proven at trial, the total damage award would be trebled and then the settlement deducted from the trebled amount. Flintkote Co. v. Lysfjord, 246 F.2d 368, 397-398 (9th Cir. 1957).

Emhart Corporation has agreed to cooperate in making witnesses available and supplying necessary factual information for trial.

The agreement further provides that the settlement shall be allocated among the public classes and the private class on an 80-20 percent basis. This allocation was based on contemporaneous records maintained by Emhart showing sales to various categories of class members.

2. The Ilco Settlement

The settlement agreement with Ilco requires Ilco to pay the sum of \$85,000 as follows:

- (i) Twenty-Five Thousand Dollars (\$25,000) has been deposited in an escrow account and is earning interest which will be added to the settlement fund.

(ii) The remaining Sixty Thousand Dollars (\$60,000) is to be paid in Twelve (12) monthly installments of Five Thousand Dollars each, commencing July 1, 1976, to be drawn on a letter of credit to the First National Bank of Boston.

It was further agreed that the Ilco settlement fund would be used to defray common litigation costs and thus would not be allocated among the public and private classes. Under the terms of the settlement, Ilco was dismissed with prejudice as a defendant, but Ilco's sales remained in the litigation as a basis for liability of the remaining defendants, Eaton and Sargent. In addition, Ilco agreed to cooperate in making witnesses available and producing necessary documents for trial.

The Ilco settlement was not based upon the relevant transactions of Ilco involved in this litigation (Ilco represents approximately 5-6% of the market), but rather was based solely on the present poor financial condition of Ilco.^{3/} It was represented by Ilco that any substantial judgment obtained against Ilco in this litigation would be uncollectible in that it would cause Ilco to be placed into

^{3/}On a transaction basis comparable to the Enhart Settlement, Ilco should pay approximately \$950,000.

bankruptcy. In support of this, Ilco made available its relevant financial records, which plaintiffs' counsel inspected and reviewed. Based upon their own research and a legal memorandum prepared by Ilco, plaintiffs concluded that, as a matter of law, a judgment against Ilco in this litigation could not be enforced against Ilco's separate parent company, Unican Security Systems, Ltd., a Canadian Corporation. Plaintiffs further considered the possible impact upon the jury of a near-bankrupt defendant.

D. The Settlements Do Not Affect The Ability Of Plaintiffs To Recover The Full Amount Of Their Damages Against The Remaining Defendants.

These separate settlements involve only two of four defendants. If a conspiracy is proven, the remaining defendants remain responsible for the entire amount of damages caused by Emhart and Ilco, less a set off in the amount of the settlements.^{4/} The two remaining defendants are very solvent corporations, capable of satisfying any judgment which may be obtained against them in these actions. Thus

^{4/}In antitrust suits, the defendants are wholly and severally liable. Thus each defendant is liable for the whole amount of the judgment. See Non-Ferrous Metals, Inc. v. Saramar Aluminum Co., 25 F.R.D. 102, 104 (N.D. Ohio 1960); Walker Distributing Co. v. Lucky Lager Brewing Co., 323 F.2d 1, 8 (9th Cir. 1963); State of Washington v. American Pipe and Construction Co., 280 F. Supp. 802, 840-805 (W.D. Wash. 1968).

the claims of the classes have not been diminished or fore-
closed in any fashion by the settlements. As stated in
Wainwright v. Kraftco, 58 F.R.D. 9, 12 (N.D. Ga. 1973):

"Indeed, if all the defendants but one settled with the class, that remaining defendant would still be liable for the damages caused by all. Since [the settling defendant] has agreed to open its files to the plaintiff class upon settlement, the class will not suffer any discovery loss either."

Moreover, the allocation of the Emhart settlement does not in any way effect the allocation of future recoveries, if any, from the remaining defendants.

E. Notices Of Settlements And The Separate Hearings.

1. The Emhart Settlement

(a) Notice And The Response:

Notice of the pendency of the class actions and of the Emhart Settlement were combined in one legal notice which was mailed on March 29, 1976 to approximately 20,000 public entities and to approximately 17,700 members of the private class (of which approximately 3,000 notices were returned as undeliverable). (A511-12) In addition, notice was published on March 29, 1976, in all regional editions of the Wall Street Journal. The notices advised class members that they had until April 28, 1976, to exclude themselves; until May 13, 1976 to have their counsel enter an appearance;

and until May 13, 1976 to file written objections to the proposed Emhart settlement. They were further advised that the hearing before the Court for approval of the settlement was to be held on June 2, 1976. (A399-400) Thus class members had more than two months to prepare for the settlement hearing.

In response to the notices, no public class member objected to the Emhart settlement or its allocation; no private class member objected to the overall settlement; and of approximately 80 attorneys who entered their appearances in the private class and another 75 to 80 private claimants who wrote the court and asked specifically to be included in the settlement, (A738), only six filed objections to the settlement's allocation and only three appeared at the hearing. (A838).

On May 15, 1976, plaintiffs submitted their memorandum in support of the settlement, which set forth the basis of the settlement and its allocation, including the underlying Emhart sales statistics for the relevant period. Prior thereto, counsel for certain private builders, Samuel Seymour, informed liaison counsel for plaintiffs that he had questions regarding the allocation to the private class and requested the Emhart sales records. Upon his analysis of those records, Mr. Seymour filed a paper in opposition to the

settlement, supported by an affidavit that summarized the dollar volume of public and private construction. (A513-587) These papers were submitted to the District Court prior to the June 2d hearing.

(b) The Hearing On June 2, 1976:

Three counsel representing various objectors appeared at the hearing. Other private class members, represented by Fredric Burns, who originally filed their own suits and then dismissed them without prejudice, spoke in favor of the settlement and its allocation. (A733-37) At the hearing, class counsel offered into evidence, in affidavit form, certain Emhart sales statistics upon which the settlement and allocation thereof were based and explained the significance of those statistics. (A674-5, 740). Those same statistics were set forth in both plaintiffs' memorandum, filed May 15, 1976 (A523), and in Emhart's memorandum in support of the settlement, filed May 27, 1976. (A541). At the hearing, the District Court invited each objector to offer whatever evidence it had (A694, 728). Only Mr. Seymour offered any evidence. At the conclusion of the hearing, however, Mr. Seymour recognized the validity of the statistical basis for the allocation and withdrew his objections thereto. (A753).

Exxon, upon oral request, was given leave to file a memorandum three days after the hearing on the limited subject of the Dykeman Study.^{5/} (A729-30) Disregarding the Court's limitations, Exxon filed a memorandum covering all their objections. Thereafter, the District Court issued its Memorandum of Decision approving the Emhart settlement and the allocation thereof. (A837). Exxon filed a motion for reconsideration (A852) accompanied by an affidavit by Robert J. Sheehan (A846), which affidavit set forth some general construction industry statistics -- almost the identical general construction industry statistics offered by Mr. Seymour at the June 2, 1976 hearing. (A573). The Court denied Exxon's Motion. This appeal followed.

2. The Ilco Settlement

(a) Notice And The Response:

Notice of the Ilco settlement was mailed on June 15, 1976 to all those class members' counsel who had filed appearances and to class members who had made any kind of inquiry to the Clerk of the Court regarding the Emhart settlement or the litigation. (A877, 905) This individual

^{5/}The Dykeman study was a study by the accountant-expert witness of non-settling defendants and on its face, appeared to corroborate the Emhart statistics on an industry-wide basis.

notice was supplemented by published notice on June 15, 1976 in all regional editions of the Wall Street Journal. (A950) The notice advised the class members of the terms of the settlement and that the basis of the settlement was Ilco's "extremely poor financial condition." (A907). The Notice further stated that "the settlement amount has no relation to Ilco's sales but is based solely on its current financial condition." (A908). It further provided that any inquiries should be made to plaintiffs' co-liaison counsel.

No written response was required in order for a class member to appear and object at the hearing.

(b) The Settlement Hearing:

No one on behalf of the public class appeared at the hearing to object. Two attorneys, Mr. Seymour and Mr. King (on behalf of Exxon) representing private class members appeared and objected.

At the hearing, counsel for Ilco introduced an affidavit by the Secretary of Ilco^{6/} identifying the Ilco financial statements furnished to plaintiffs' counsel and representing that Ilco's financial situation has not im-

^{6/}Appellants make much of the fact that the affiant, Mr. Dewey, was a law partner of counsel for Ilco. That fact is wholly irrelevant. Mr. Dewey was an officer of Ilco Corporation authorized to take an affidavit on Ilco's behalf.

proved since the last of those statements, that "substantially all of Ilco's assets have been pledged," that Ilco's main plant is closing, that Ilco has terminated its architectural hardware business, that Ilco is in arrears to its attorneys in excess of \$70,000 for legal services rendered, that Ilco's parent corporation, which purchased Ilco's stock in 1972 after the commencement of this litigation, did not provide for the assumption of debts and liabilities of Ilco and that "after the acquisition, Ilco continued to operate as a corporate entity separate and distinct from its parent...." (A963-4). Also introduced was a memorandum of law prepared by Ilco's counsel concerning the liability of a parent for the debts and acts of its subsidiary. Also put into evidence by Exxon were the Ilco financial statements upon which plaintiffs' counsel relied. These financial statements had been made available to Objector more than a week prior to the hearing. No other evidence was offered. Exxon's counsel did request to cross-examine plaintiffs' co-liaison counsel, Mr. Montague, "to find out what he has done on the basis of these financial documents," (A986) and "....what steps he took to become convinced that there was no fraudulent transactions here." (A994). The District Judge denied the request and then himself proceeded to cross-examine Mr. Montague. (A986-7). Mr. King (Exxon) stated he thought he

needed "an evidentiary record" and suggested a Special Master be appointed. (A1003). The District Judge denied the request for the appointment of a Special Master. Objector, in its Brief, quotes the District Court out of context with respect to the denial of the request for a Special Master. Objector quotes the Judge as responding "Not a chance," but Objector omits the remainder of the Court's response:

"There's only \$85,000. If you refer it to a Special Master there wouldn't be anything left." (A1004).

Objector made no request to offer any further evidence despite the District Court's opening to do so:

"THE COURT: I didn't deny you leave to present evidence. I denied you leave to examine Mr. Freeman [sic] under oath." (994).

Nor did Objector ask to question any officers of Ilco or move that the hearing be continued to a future date.

At the conclusion of the hearing, the District Court approved the settlement. (A1006)

A R G U M E N T

I.

SCOPE OF JUDICIAL REVIEW

On these appeals from judicially approved settlements, Objector bears an extremely heavy burden. An appellate court does not consider the propriety of a settlement

de novo. It is well established that:

"....this Court will intervene in a judicially approved settlement of a class action only when the objectors to that settlement have made a clear showing that the District Court has abused its discretion." City of Detroit v. Grinnell Corporation, 495 F.2d 448, 455 (2d Cir. 1974).

See West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079, 1085 (2d Cir. 1971), cert. den. sub nom. Cotler Drugs, Inc. v. Chas. Pfizer & Co., 404 U.S. 871 (1971).

In In Re Riggi Bros. Co., 42 F.2d 174, 176 (2d Cir. 1930)^{7/} this Court held that "...The action of the District Court [in affirming the settlement] is presumptively right, and will not be set aside unless clearly shown to have been wrong." In Patterson v. Newspaper & Mail Del. U. of N.Y., 514 F.2d 767, 771 (2d Cir. 1975) this Court stated:

"....Nor should we substitute our ideas of fairness for those of the district judge in the absence of evidence that he acted arbitrarily or failed to satisfy himself that the settlement agreement was equitable to all persons concerned and in the public interest...." 514 F.2d at 771.

Accord, Flinn v. FMC Corp., 528 F.2d 1169, 1172 (4th Cir. 1975).

Where, as here, the settlement and allocation received a favorable reception from the vast majority of class

^{7/}In Re Riggi Bros. Co., *supra*, has been cited with approval in Young v. Katz, 447 F.2d 431, 433 (5th Cir. 1971).

members and individual attorneys^{8/}

"who had little or nothing to do with the negotiation of the settlement, [it] is strong evidence that the District Court not only failed to abuse its discretion in approving the settlement but fulfilled its obligation in exemplary fashion." City of Detroit v. Grinnell Corp., 495 F.2d at 462.

Here, of 20,000 notices to the public class, there were no objections to the Emhart settlement and allocation thereof. Of 15,000 delivered notices to the private class plus published notices, three attorneys appeared at the settlement hearing to object, one attorney (Samuel H. Seymour, Esquire) representing approximately 150 claimants, withdrew his objections, and only one attorney has pursued his objections on appeal. There were no objections to the Ilco settlement from the public class and only two from the private class.

The strong public policy in favor of settlements requires that opposition to them should be made difficult, especially at the appellate level. See Newman v. Stein, 464 F.2d 689, 692 n. 7 (2d Cir. 1972); Weight Watchers of Philadelphia, Inc. v. Weight Watchers Int'l, Inc., 455 F.2d 770, 773 (2d Cir. 1972) (dictum). As stated by the Fifth Circuit in Florida Trailer & Equipment Co. v. Deal, 284 F.2d 567,

^{8/}See supra, at pp.14, 17.

571 (5th Cir. 1960): "[T]he very uncertainties of outcome in litigation, as well as the avoidance of wasteful litigation and expense, lay behind the Congressional infusion of power to compromise. This is a recognition of the policy of the law generally to encourage settlements." Accord, Pfizer, Inc. v. Lord, 456 F.2d 532 (8th Cir. 1972), cert. den., 406 U.S. 976. See also Williams v. First Nat. Bank of Pauls Valley, 216 U.S. 582 (1909); Haudek, The Settlement and Dismissal of Stockholders' Actions -- Part II, 23 Sw.L.J. 765, 793 (1969).

Accordingly, unless the District Court is found to have clearly abused its discretion in reaching its results, the approval of the Emhart and Ilco settlements, including the allocation of the former, should stand. It is respectfully submitted that there was no clear abuse of discretion.

II.
THE DISTRICT COURT APPLIED THE
PROPER STANDARDS

The District Court applied the proper criteria in determining whether or not to approve the Emhart settlement and the Ilco settlement. The Court reached its decision after weighing the "objective evidence of fairness presented."
(A840)

Judicial consideration of the proposed settlement should not involve the trial judge on the merits of the controversy. State of West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710, 714 (S.D.N.Y. 1970), aff'd, 440 F.2d 1079, 1085-86 (2d Cir.), cert. denied, 404 U.S. 871 (1971). "The very purpose of a compromise is to avoid determination of sharply contested and dubious issues." . . . In re Prudence, 98 F.2d 559, 560 (2d Cir. 1958). Resolution of substantive questions would undermine the strong "public policy of encouraging settlements." Florida Trailer and Equipment Co. v. Deal, 284 F.2d 567, 571 (5th Cir. 1960); Moses-Ecco Co. v. Roscoe-Ajax Corp., 320 F.2d 685, 690 (D.C. Cir. 1963).

It is not the Court's purpose in this process to "balance the scales with the nicety of an apothecary." Glicken v. Bradford, 35 F.R.D. 144, 152 (S.D.N.Y. 1964). "The Court will not substitute its business judgment for that of the parties." Zerkle v. Cleveland-Cliffs Iron Co., 52 F. R.D. 151, 159 (S.D.N.Y. 1971).

In City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974), the Court of Appeals summarized the factors basic to judicial scrutiny of a settlement of a case similar to this:

"(1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the set-

tlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation." [Citations omitted]

In appraising the fairness of a proposed settlement, view of experienced counsel favoring the settlement is "entitled to considerable weight," Fielding v. Allen, 99 F. Supp. 137, 144 (S.D.N.Y. 1951), and there is "a strong initial presumption that the compromise is fair and reasonable." Josephson v. Campbell, 1967-69 CCH Fed. Sec. L. Rep. ¶92,347 (S.D.N.Y. 1969). State of West Virginia v. Chas. Pfizer & Co., 314 F. Supp. at 741; Levin v. Mississippi River Corp., 59 F.R.D. 353, 361 (S.D.N.Y. 1973); Feder v. Harrington, 58 F.R.D. 171, 174-75 (S.D.N.Y. 1973).

In weighing the proposed settlement, the Court must determine whether the amount of the settlement falls within a "range of reasonableness," which has been defined by Judge Friendly as "a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion...." Newman v. Stein, 464 F.2d 689, 693 (2d Cir. 1972). The "range of reasonableness" ap-

proach should apply to settlement allocations as well as the settlement amount itself.

While each factor may not have been separately articulated by the District Court, it is clear from a full reading of the transcripts of the June 2 and June 28, 1976, hearings and the June 14, 1976 Memorandum of Decision that the Court did consider and apply the proper criteria.^{9/}

III.

THE DISTRICT COURT ACTED WELL WITHIN ITS DISCRETION

A. The District Court Had A Long, Detailed And Intimate Knowledge Of The Legal And Factual Issues In This Case.

The settlement with Emhart was entered into approximately five years after this litigation had been commenced and was approved by the District Court almost a full year there-

^{9/}The Memorandum of Decision followed the settlement hearing by twelve days. It is not inconceivable that the District Court issued its prompt decision so that any appeal would not postpone the scheduled trial date of September 14, 1976.

That the District Court was fully aware of the proper standards for reviewing a settlement is demonstrated by its recent opinion in Herbst v. International Telephone and Telegraph Corporation, Civil No. 15,155 (Ruling dated August 11, 1976), wherein Judge Blumenfeld rejected a proposed settlement in a 22 page opinion. Therein, he fully recognized the settlement criteria enunciated in City of Detroit v. Grinnell Corp., *supra*. The fairness hearing in Herbst was held on June 4, 1976 -- two days after the Emhart hearing.

after -- approximately three months before the trial was scheduled to commence. The Ilco settlement was entered into after approximately six years of litigation. During that time, Judge Blumenfeld gained a familiar and detailed knowledge of the factual and legal issues in the case. Judge Blumenfeld had also presided over the federal government's civil proceedings against the same four defendants and a trial of that case against Eaton. United States v. Eaton Yale & Towne, Inc., 1972 Trade Cas. ¶73,889 (D. Conn. 1972). Besides his able administration of this protracted and complex litigation, he had ruled on numerous discovery motions, two motions for summary judgment and a motion for class decertification.^{10/} Moreover, he had before him plaintiff's original and supplemental Designation of Evidence based upon substantially completed discovery.^{11/} Therefore,

^{10/}In re Master Key Antitrust Litigation, 70 F.R.D. 23 (D. Conn. 1975), appeal dismissed, 528 F.2d 5 (2d Cir. 1975); Amherst Leasing Corp. v. Emhart Corp., 65 F.R.D. 121 (D. Conn. 1974); In re Master Key Antitrust Litigation, 1973-2 Trade Cas. ¶74,680 (D. Conn. 1973); In re Master Key Antitrust Litigation, 53 F.R.D. 87 (D. Conn. 1971); In re Master Key Antitrust Litigation, 70 F.R.D. 23 (D. Conn. 1975).

^{11/}September 1, 1976 is the discovery cut-off. Most discovery conducted since March, 1976 related to expert witnesses and designated trial witnesses not previously deposed.

the District Court had acquired considerable knowledge regarding the nature of the builders hardware industry, the structure of the market and the means of distribution and sale, as well as the strength and weakness of each side's evidence regarding the alleged antitrust violation.

The detailed background and knowledge of the District Court concerning the case in question is important in assessing the exercise of the District Court's discretion.

As stated in Flinn v. FMC Corp., supra, 528 F.2d at 1173:

"....The fact that all discovery has been completed and the cause is ready for trial is important since it ordinarily assures sufficient development of the facts to permit a reasonable judgment on the possible merits of the case."

In Grinnell, this Court stressed that:

"Great weight is accorded his [the trial judge's] views because he is exposed to the litigants, and their strategies, positions and proofs. He is aware of the expense and possible legal bars to success. Simply stated, he is on the firing line and can evaluate the action accordingly," Ace Heating & Plumbing Co., Inc. v. Crane Co., 453 F.2d 30, 34 (3d Cir. 1971). City of Detroit v. Grinnell Corp., supra, 495 F.2d at 454.

B. There Was Substantial Evidence Before The Court To Support Its Approval Of The Emhart Settlement And Its Allocation.

The amount of evidence required for a proper evaluation of a settlement was set forth in Grinnell:

"The question becomes whether or not the District Court had before it sufficient facts intelligently to approve the settlement offer." City of Detroit v. Grinnell Corp., 495 F.2d at 462-3.

The Fourth Circuit expanded on this thought:

"....it is entirely in order for the trial court to limit its proceedings to whatever is necessary to aid it in reaching an informed, just and reasoned decision. So long as the record before it is adequate to reach 'an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated' and 'form an educated estimate of the complexity, expense and likely duration of such litigation,....and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise,' it is sufficient." Flinn v. FMC Corp., supra, 528 F.2d at 1173.

As Exxon concedes, it did not object to the overall Emhart settlement, but only to the allocation of that settlement between the public and private classes respectively. (A722) (O.B.3).^{12/} The exact same evidence offered to support the total Emhart settlement was offered to support the allocation. Specifically, that evidence was Emhart Corporation's annual summaries of contract hardware sales by Dodge Project Classification for the years 1965 through 1968, inclusive. Despite objector's unsupported allegations to the contrary, those figures were contemporaneously kept by Emhart in the regular course of its business and, most importantly, were prepared prior to the commencement of this litigation. (A566, 740). The figures

^{12/}"O.B." designates Appellants-Objectors' Brief filed August 17, 1976.

are unique in that they give the amount of sales for the very products in litigation to the claimants (public and private buildings) represented in the respective class actions. It was these figures which determined both the adequacy of the overall Emhart settlement and the 80%/20% allocation between the public and private classes respectively.^{13/} Plaintiffs and the Court below were fortunate to have exact business records with which to determine an allocation. General statistics regarding public and private construction would not reflect the fact that only a small percentage of private construction -- hotels, motels, office and apartment buildings -- falls within the definition of the private class.^{14/}

^{13/}In continually referring to the allocation as "arbitrary," Objector ignores the statement at the hearing by Mr. Montague that: "In order to satisfy ourselves as to what the proper allocation was, we made a very detailed study of the statistics in the Emhart files and those sales statistics, Your Honor, are unique. . . ." (App.740).

^{14/}While plaintiffs and Emhart Corporation also offered the "Dykeman Study" in support of the allocation, that study was not primary support, but only corroborative of the Emhart statistics.

The "Dykeman Study" was a statistical analysis made by the accountant-expert witness of the non-settling defendants. The study was made known to plaintiffs during Mr. Dykeman's deposition in April, 1976, approximately eight months after the Emhart settlement agreement was entered into. Plaintiffs never claimed that the Dykeman Study was complete or even accurate, since plaintiffs did not request direct or supervise the study or its preparation. However, for what it is worth, it does support the 80%/20% allocation among the classes.
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With respect to the overall Emhart settlement, Objector had no basis to accept the \$7.5 million figure except in reliance of the Emhart sales statistics. While Objector must have accepted the Emhart sales figures for that purpose, it rejected those figures for no apparent reason with respect to allocation. It is not the allocation which is arbitrary, it is Objector's disregard for the Emhart figures with respect to the allocation which is arbitrary.

In its brief, Exxon relies mainly upon an affidavit of Robert J. Sheehan, filed twenty-two days after the Emhart settlement hearing of June 2, 1976. Mr. Sheehan, who never appeared before the District Court, is employed by the National Association of Home Builders (NAHB) and thus represents a group of builders who are not included in the class.^{15/}

The Sheehan affidavit is entirely misleading for it includes figures for "non-residential" private construction which is not involved in this litigation. These are

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Exxon, while not being able to attack the Emhart statistics, placed the emphasis of its objections in the Court below upon the Dykeman Study. While plaintiffs disagree with Objector's attack on the Dykeman Study, plaintiffs deem it irrelevant since neither the plaintiffs nor the Court below relied upon that study.

15/Residential homes do not have Master Key Systems.

projects in the following categories: Industrial, Commercial,^{16/} Religious, Educational, Hospital and Institutional and other non-residential buildings. Moreover, Sheehan's "Multifamily Residential" private construction statistics include buildings which are 2 to 4 units and which would not be master keyed.^{17/} While the U.S. Bureau of Census figures point this out, Mr. Sheehan does not so inform the Court. The emphasis that Exxon places on private college and hospital construction (O.B. 20) is similarly misplaced; that construction is not included within the definition of the private class.

Mr. Sheehan's figures must be adjusted to eliminate private construction that is not involved in this litigation. As so corrected, the proper approximate figure to be derived from Mr. Sheehan's general industrial statistics for relevant private construction in this case for 1967

^{16/}The only non-residential buildings included in the private class are "office buildings" which comprise part of the "commercial category."

^{17/}Indeed, many buildings of "5 units and over" may not be master keyed or may not be master keyed by defendants herein. These are just some examples of the many uncertainties which surround Exxon's suggested statistics.

is \$7,430 million (\$4,475 million plus \$2,955 million).^{18/}

Sheehan's statistics for public buildings for 1967 is \$25,536 million. Thus the total relevant general construction from Sheehan's affidavit for both public and private classes, using U.S. Census Bureau Figures, is \$32,966 million. Using these figures, the private class consists of 22.54% of the total construction and the public class consists of 77.46%. Thus corrected, the U.S. Census Bureau figures, even with all their uncertainties, clearly support the Emhart sales figures.

Moreover, the figures advanced by Mr. Sheehan do

^{18/}More particularly, the U.S. Bureau of Census figures for "valuation of Private Construction authorized by Building Permits: 1967 to 1974" shows that for 1967, only 16.8% of "Non-Residential" buildings were office buildings (as taken from Statistical Abstract of the United States, 1973, Table No. 1141). Office buildings are the only category of non-residential building covered by this class settlement. Thus, Exxon's and Mr. Sheehan's Non-Residential figure must be reduced by 83.2% (100%-16.8%) to \$2,955 million (\$17,589 million x 16.8%).

The "Multifamily Residential" figures used by Exxon and Mr. Sheehan include buildings 2 to 4 units which generally are not master keyed and should not be included within the class. The same U.S. Bureau of Census figures show that of all "Multifamily Residential" buildings, 83.7% include 5 units and over, which are not necessarily master keyed. Thus Exxon's figure for "Multifamily" buildings in 1967 must be reduced by at least 16.3% or 100%-83.7%, which amounts to \$3,954 million. However, to this figure, we must add the U.S. Census figures for "non-housekeeping" units in 1967, which is \$521 million. This gives a total for 1967 for Multifamily buildings of \$4,475 million.

not relate to the contract hardware industry and do not consider the fact that contract hardware represents only approximately .25% of private construction costs (Scavo¹⁹/ Deposition, A44) but represents "a fraction of 1% to as much as 4% or 5%" of public construction costs (Belfi²⁰/ Deposition, A55).

Finally, Exxon continues to disregard the following factors:

(i) only hotels, motels, apartment buildings and office buildings are included in the litigation, whereas all public building construction is included.

(ii) the vast majority of master key extensions occur in the public sector, in buildings such as schools and colleges, and the evidence shows higher overcharges on extensions.

(iii) in private construction, contract hardware is frequently purchased on an allowance basis and not by the competitive bidding required in public construction.

¹⁹/Mr. Scavo is the purchasing agent for the private plaintiff class representatives.

²⁰/Mr. Belfi is involved in construction purchases for City of Philadelphia, class representatives of the nationwide public class.

Accordingly, even the dilatory attack by Exxon on the 80%/20% allocation was so fraught with uncertainties that it was without probative value. In contrast to Objector's shoddy figures, the District Court relied on Emhart's relevant sales statistics, statistics represented by Emhart to be "Emhart's best contemporaneous source of information for tracing its contract hardware to types of end users and are the most logical means to determine the allocation between public and private classes." (A566).

Objector also argues that sales of the entire industry, and not just Emhart's sales, should be the proper basis for the interclass allocation of the Emhart settlement. The District Court answered this question in its decision as follows:

"The most pragmatic response is that the combined sales figures are simply not available. The second response is that the objectors have not demonstrated any reason to assume that the figures of the other defendants would differ materially from those presented by Emhart.^{6/}

6/And this is despite the fact that at least one of the objectors, Exxon Corporation, has been receiving the active assistance of one of the non-settling defendants, Eaton Corporation. Arguably this cooperation would have included some evidence of a different ratio, if one existed." (A839) [Emphasis added].^{21/}

^{21/}There was substantial support in the transcript of the June 2, 1976 hearing for the District Court to conclude that Exxon was receiving "active assistance" from defendant Eaton Corp. (A726, 727, 728, 729).

Subsequent to the June 2 hearing, plaintiffs did in fact receive statistical information prepared by Eaton, in the form of a study of "Lost Job Reports". (A956-7).^{22/} That study was produced by Eaton when required to designate their trial exhibits on August 1, 1976. The "Lost Job Report" Study not only supports the 80%/20% allocation based on Emhart's records, but in fact supports the conclusion that the private class received favored treatment. It shows that of the 1,121 jobs included in the study, 84.21% (944 jobs) were public and 15.79% (177 jobs) were private. Upon elimination of certain categories of buildings which were not included within either class, the relevant statistics are:

<u>CATEGORY OF PRIVATE JOBS</u>	<u>NO. OF JOBS</u>
Private Housing-Apartments	6
Hotel, Motel	15
Office Buildings	89
TOTAL RELEVANT PRIVATE JOBS:	<u>110</u>

^{22/}Plaintiffs further suspect that such information might have been available from Eaton at the time of the hearing. The basis for this suspicion is as follows:

On April 20, 1976, plaintiffs deposed the non-settling defendants accountant-expert witness, Francis Dykeman. During that deposition, Mr. Dykeman testified that he was making a study "to identify sales made to distributors for original sales and extension of sales and public and private sales." (Supplemental Appendix annexed hereto, A 1043-45). When plaintiffs' co-liaison counsel, Mr. Freeman, inquired into what records were being used in that study, Mr. Bates, counsel for Eaton, refused to let Mr. Dykeman answer "any inquiry at all as respects that [study]."

<u>CATEGORY OF PUBLIC JOBS</u>	<u>NO. OF JOBS</u>
Public Hospital	121
Public School	371
Public College	229
Public Housing	52
Municipal Buildings	33
County Buildings	16
Public Other	95
TOTAL RELEVANT PUBLIC JOBS:	<u>917</u>

The above breakdown shows that of the total of 1027 relevant jobs, 10.71% (110 jobs) were private and 89.29% (917 jobs) were public.

Plaintiffs recognize that the Eaton figures do not represent total sales and acknowledge that they have no idea how these jobs were selected, but it is plaintiffs' understanding that these were all the jobs included on Eaton's Lost Job Reports, filed by Eaton's salesmen and/or distributors between 1965 and 1970. In the very least, they corroborate the allocation based on Emhart's sales figures and indeed, make that allocation appear very attractive to the private class.

Exxon misrepresents Wainwright v. Kraftco Corp., 58 F.R.D. 9, 11 (N.D. Ga. 1973), (O.B. 38), as holding that a settlement cannot be tested against the proportioned sales of the settling defendant, but must be judged against total claims of the class. On the contrary, the settlement in Wainwright was structured identically to the Ilco settlement.

The amount received in settlement was used to pay certain litigation expenses. Accordingly, the Wainwright opinion noted that the settlement was not related to defendant's sales, just as the Ilco settlement is not related to its sales.

While it has been recognized that "an element of arbitrariness is inherent" in any formula for the computation of class damages and that "particularly in a class action the damage question must be approached pragmatically," Feit v. Leasco Data Processing Equipment Corp., 332 F. Supp. 544, 587 (E.D.N.Y. 1971), in the cases sub judice, the District Court had before it a most reasonable measuring rod for allocation of the settlement.

The reasonableness of the Emhart figures as a basis of the class allocation was further recognized by Samuel H. Seymour, Esquire, who represented approximately 150 private class members and who had been counsel for a private builder-owner class in In Re Gypsum Cases, Civil No. 46414-A-A52 (N.D. Cal.) Mr. Seymour, who initially objected to the settlement, subsequently withdrew his objections and supported the Emhart allocation on the basis of the Emhart figures.

"[Seymour:] I also am satisfied from my discussion with Mr. Freeman and also reading the Gibbs affidavit

[A592] carefully that at least as to the questions I raised about the accuracy of the Emhart statistics, I'm satisfied now that I understand those statistics and I no longer have those reservations." (A752-3) [Emphasis added].

The District Court made it clear that it relied upon the Emhart statistics in approving the class allocation:

"In this case, the inter-class allocation of the settlement is based on something more than an arbitrary division by counsel for the various plaintiffs. The proposed allocation is, in fact, based on the historical allocation of Emhart's sales, as demonstrated by its record of orders during the period in question, given this basis in fact, it is not necessary or appropriate to engage in speculation concerning possible alternative allocations based on some other hypothetical circumstances." (A838)

C. There Was Adequate Evidence For The District Court To Determine Ilco's Financial Condition For Settlement Purposes.

With respect to the Ilco settlement, the sole issue before the Court below was whether Ilco was in such a poor financial condition that a substantially discounted settlement with it should be approved, recognizing that two solvent non-settling defendants remained in the case.^{23/} In-

^{23/}Objector raises for the first time on this appeal the issue of whether the notice to the class of the Ilco settlement was sufficient. That issue cannot now properly be heard by this Court. The well established rule in this Circuit "forecloses appellate consideration of issues not raised below." Terkildsen v. Waters, 481 F.2d 201, 204-5 (2d Cir. 1973). See also, Fortunato v. Ford Motor Co., 464 F.2d 962, 967 (2d Cir. 1972), cert. den. 409 U.S. 1038; and Schwartz v. S.S. Hassau, 345 F.2d 465, 466 (2d Cir. 1965), cert. den. 382 U.S. 919.

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deed, Mr. King conceded at the hearing on June 28, 1976:
"If that's [\$85,000] all they can pay, Your Honor, I think I would have no objection." (A1003).

In making its determination, the District Court had before it the financial statements of Ilco, an affidavit of the Secretary of Ilco describing its current financial situation, and a memorandum of law concerning the circumstances under which a parent corporation may be held responsible for the debts and prior unadjudged liabilities of a subsidiary it acquired. Moreover, counsel for plaintiffs represented to the Court that they had reviewed the financial statements, had done their own independent research, and that they had reached the conclusion that Ilco was indeed in poor financial condition and that there was no recourse against Ilco's parent corporation.

As set forth by plaintiffs' counsel at the hearing, the Ilco financial statements showed a company that lost sub-

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Moreover, there is authority that no notice to the class is required where the amount in settlement is small, and where the number and size of the remaining defendants is such that the settlement would have no significant effect on the claims of absent members. See Philadelphia Electric Co. v. Anaconda American Brass Co., 42 F.R.D. 324, 328 (E.D.Pa. 1967), Such are the circumstances in the cases sub judice.

stantial amounts of money in the eight (8) years preceding the settlement. Indeed, Ilco lost approximately \$3,700,000 in the four (4) years prior to its acquisition by Unican Security Systems, Ltd., (A977) Moreover, the financial statement for 1975 shows that Ilco owes more than \$2,500,000 in a note payable to the First National Bank of Boston and long-term debt. All of Ilco's trade receivables, inventory, and real and tangible properties are pledged as security for the loans from the First National Bank of Boston and the Massachusetts Business Development Corporation. (A768) Plaintiffs' counsel was candid in advising the Court below that they noticed some inter-corporate transactions involving Ilco that appeared suspicious. (A978) Under all the circumstances, however, plaintiffs' counsel did not consider these transactions as raising sufficient doubt to investigate further.

The financial statement shows that Ilco ships its raw inventory to a North Carolina affiliate to be finished. These products are then sold through Ilco, which receives 16% of the sales price. (A767) Exxon agrees that Ilco may have subcontracted this manufacturing function at less than a fair price (O.B. 23-25). But as the Court noted, the existence of Ilco's large debt to major creditors such as the First National Bank of Boston and the Massachusetts Redevelopment

Authority provided adequate safeguards, upon which plaintiffs could rely, against the fraudulent transfer of Ilco's assets to its affiliated companies:

"You have some lingering thought that creditors of that sort are going to sit by and let this business siphon out funds fraudulently." (A988)

In addition, the Court below had been advised of Ilco's poor financial condition as early as January 27, 1975 (A257, 258, 262), and Ilco's financial problems were discussed at a pre-trial conference on May 21, 1976. Moreover, the Court was aware that Ilco had effectively dropped out of the litigation more than a year ago, failing to respond to any discovery requests propounded by plaintiffs.

Under all the circumstances of this case, the Court below's decision to approve the Ilco settlement for a discounted amount was well within its judicial discretion.

The inability of a defendant to pay is a proper consideration of the Court when approving a settlement. City of Detroit v. Grinnell Corporation, 495 F.2d 448, 467 (2d Cir. 1974); In re National Student Marketing Litigation, 68 F.R.D. 151, 156 (D.D.C. 1974). In Grinnell, the Court recognized that "Common sense seems to dictate the necessity, to say nothing of the propriety, of such a consideration." 495 F.2d at 467. The Court then relied upon Protec-

tive Committee v. Anderson, 390 U.S. 414, 424-425 (1968), wherein the Supreme Court cautioned each judge, in evaluating the settlement, "to form an educated estimate of [inter alia]....the possible difficulties of collecting on any judgment which might be obtained...." [Emphasis added].

Likewise, in the National Student Marketing Litigation, the district court approved a partial settlement with one financially troubled defendant recognizing the "moving force" behind the settlement was that defendant's "uncertain financial condition." 68 F.R.D. at 155. The Court noted that "too large a recovery after trial might drive NSMC into bankruptcy, converting any fought for judgment into a mere pyrrhic victory." 68 F.R.D. at 156.

The reasoning of Grinnell and National Student Marketing applies with equal force to the cases sub judice. In addition, here, (i) two solvent defendants remain, (ii) the sales of Ilco remain in the litigation, (iii) what already appears to be a lengthy jury trial with complex issues will be somewhat shortened and simplified by the removal of a defendant which does not have the financial capability to contribute to a final judgment for damages, and (iv) Ilco has agreed to furnish to plaintiffs pertinent information regarding, inter alia, sales and installations of master key systems.

The cases cited^{24/} by Objector (O.B. 35-36) in support of its contention that the District Court violated this Circuit's rules governing approval of settlements are inapposite. First, the attempted settlements in those cases would have released all of the defendants.^{25/} In the instant cases, plaintiffs can recover from the non-settling defendants all of the damages caused by Ilco's conduct. Secondly, in the two cases involving the issue of the defendant's ability to pay an amount larger than that offered in settlement, significantly different facts were involved. In Percodani, apparently no evidence at all was submitted on this issue.^{26/} In Fricke, proponents of the settlement produced affidavits showing that two individual defendants were presently insolvent. In rebuttal, objectors presented evidence that the two individual defendants in fact "earned substantial incomes,"

^{24/}Percodani v. Riker-Maxson Corp., 50 F.R.D. 473 (S.D.N.Y. 1970); Fricke v. Daylin, Inc., 66 F.R.D. 90 (E.D.N.Y. 1975); Weiss v. Chalker, 55 F.R.D. 168 (S.D.N.Y. 1972).

^{25/}Percodani, 50 F.R.D. at 477; Fricke, 66 F.R.D. at 93; Weiss, 55 F.R.D. at 169.

^{26/}From the opinion, it appears that the depositions referred to therein, and relied upon by appellants here, dealt with the merits of the case, which, of course, is relevant to a wholly different requirement for the determination of the settlement's propriety. 50 F.R.D. at 478.

and that their present insolvency was "only the technical result of the vagaries of the stock market." Thus, the court concluded that the individual defendants could satisfy a larger settlement obligation, 66 F.R.D. at 97, and that the proposed settlement actually would benefit the individual defendants at the expense of the corporation.

Here, unlike the Fricke case, Objector filed no papers and presented no rebuttal evidence. The financial statements and affidavit before the District Court supported the conclusion that Ilco could not satisfy a large judgment.

Exxon also questions whether Ilco's parent, Unican, is in fact immune from Ilco's liability, if any, in these actions. Under all the circumstances, the Court below could properly approve the Ilco settlement without conclusively resolving that issue of law. There is no question that such judicial resolution would require a trial of its own.^{27/}

^{27/}The need for a full-fledged trial to determine the issue is demonstrated by the cases relied upon by appellants. In both Knapp, supra, and Bernardin v. Midland Oil Corporation, 520 F.2d 771 (7th Cir. 1975), trial were required. In the other two cases, Hoche Productions, S.A. v. Jayalk Films Corp., 256 F. Supp. 291 (S.D.N.Y. 1966), and U.S. v. Van Raalte Co., 328 F. Supp. 827 (S.D.N.Y. 1971), the defendants had admittedly either controlled the acquired firm (Van Raalte, 328 F. Supp. at 829) or expressly "assumed [the acquired firm's] liabilities." Hoche, 256 F. Supp. at 295.

The policy behind the corporate veil or instrumentality rule^{28/} is to prevent a plaintiff from being denied an opportunity to recover his damages. As the Third Circuit has stated:

"In the present case, [plaintiff] is confronted with the melancholy prospect of being barred from his day in court." Knapp v. North American Rockwell Corp., 506 F.2d 361, 368 (3d Cir. 1974).

In all of the cases relied upon by Exxon, recovery hinged on the issue of piercing the corporate veil. Thus, without piercing, there would be no recovery at all.

Under the present settlement with Ilco, no such prospect exists for the class members. All of the damages suffered as a result of Ilco's unlawful conduct can be recovered against the admittedly solvent non-settling defendants. Flintkote v. Lysfjord, 246 F.2d 368, 398 (9th Cir.), cert. denied, 355 U.S. 835 (1957).

D. Objector Did Not Review The Record And Presented No Timely Evidence Of Its Own.

(1) Exxon Had Ample Opportunity To Prepare Evidence For The Settlement Hearings.

Class members, including Objector, had ample time to prepare evidence for the settlement hearings. Exxon's

^{28/}Steven v. Roscoe Turner Aeronautical Corp., 324 F.2d 157, 164 (7th Cir. 1963).

claim that it did not have sufficient notice is disingenuous and is belied by the facts.

With respect to the Emhart settlement, notice was mailed 66 days prior to the hearing. It is unexplainable that counsel for other objectors (Mr. Seymour) had ample time to prepare for the hearing and submit an affidavit and Exxon did not. Indeed, Mr. Seymour, in his memorandum, stated:

"We have obtained a copy of the settlement agreement and have corresponded with counsel for the class representatives requesting certain information concerning the settlement and the proposed plan of allocation among the classes. On the basis of our examination of the agreement and the information provided us by class counsel, several questions have arisen that must be answered....". (A578) [Emphasis added].^{29/}

On the basis of the facts and Mr. Seymour's statement, we cannot help but ask: How could Mr. Seymour be given adequate notice and Mr. King (Exxon) not be given adequate notice?

With respect to the Ilco settlement, the Court ordered the approval hearing thirteen days after the notice

^{29/}It was in response to Mr. Seymour's questions that the Gibbs and Freeman affidavits were filed with the Court below. (A674).

was mailed and published. There also, however, objectors were given the relevant back-up material at least one week in advance.^{30/} Indeed Mr. King acknowledged that he had access to this information. (A1003).

With respect to the Emhart settlement hearing on June 2, 1976 and the Ilco settlement hearing on June 28, 1976, Objector neither requested discovery nor requested a continuance so that it would have time to prepare. As aptly stated in Kohn v. American Metal Climax, Inc., 489 F.2d 262, 264 (3d Cir. 1973):

"....the appellants [objectors] contend that the procedural incidents of the hearing, especially those relating to discovery and cross-examination, were inadequate. Yet it is uncontradicted that [objectors] did not seek discovery prior to the hearing, or seasonably request additional time to prepare for examination of witnesses. Instead, [objectors] made a general request for discovery at the hearing, and declined to examine the parties that were present at the hearing. Moreover, the [objectors] did not utilize the opportunity prior to the hearing to marshal any evidence indicating that the settlement should not receive court approval or to analyze in any way the vast amount of evidence already in the record relating to the question of value. Thus, we reject the contention." [Emphasis added].

^{30/}The material (including Ilco's financial statements) were mailed to Mr. Seymour on June 18. On that same day, Mr. King (Exxon) was informed by letter that this information was available for inspection at Mr. Seymour's office. (Both Mr. King and Mr. Seymour have their offices in Washington, D.C., only several blocks apart. A copy of Mr. Montague's letter of June 18, 1976 to Mr. King is included in the supplemental appendix annexed to this brief (A1046-47).

The decisions relied upon by Exxon are inapplicable on their facts. In Girsh v. Jepson, 521 F.2d 153 (3d Cir. 1975), the Third Circuit based its conclusion that the objector was not given adequate opportunity to object on the facts that, prior to the hearing, objector submitted interrogatories which were not answered and then moved for a continuance of the hearing date, which motion was denied. 521 F.2d at 156. The Third Circuit concluded: "In our view, from the time objector, Frackman, became actively involved in this case, she did everything within her power to prepare for the settlement hearing." 521 F.2d at 158. On the contrary, Exxon did nothing;^{31/} it did not ask for information, it did not request a postponement. It didn't even properly file its Entry of Appearance and Notice of intention to appear. As a result, plaintiffs did not know Exxon was objecting to the Emhart settlement until its

^{31/}In contrast to Objector's "do nothing" posture during the period from notice to hearing, plaintiffs' co-liaison counsel were consumed in trial preparation against the non-settling defendants, complying with the final pretrial order, attending depositions of trial witnesses and expert witnesses and inspecting documents of distributors (located throughout the country) designated as trial witnesses by non-settling defendants.

counsel appeared at the June 2, 1976 hearing.^{32/}

Moreover, in Jepson the settlement negotiations commenced "soon after discovery commenced." 521 F.2d at 155. In contrast here, the cases had been actively pursued over a five year period prior to settlement negotiations. In Saylor v. Lindsley, 456 F.2d 896 (2d Cir. 1972), also relied upon by Exxon, the settlement was entered into at a very early litigation stage; two individual defendants had not been served; there had been "little discovery of documentary evidence; there had been "no attempt to find....inculpatory correspondence.....". 456 F.2d at 901. Compounding this Court's concern was the fact that the named plaintiff objected to the settlement. The Court in Saylor concluded that under those circumstances, "it does require the Court to exercise particular care to see to it that the non-assenting plaintiff has had full opportunity to develop the basis for his objection." 456 F.2d at 901. [Emphasis added]. For those reasons, the Court held that further hearings should be

^{32/}In total disregard of the class Notice, Exxon did not file its legal papers at the designated Post Office Box, but rather filed them directly with the Clerk of the Court without serving copies on counsel for the parties.

held.^{33/} Unlike the Saylor case, in the cases sub judice, discovery was immense and sufficient facts were before the District Court (and available to any potential objector) in order to allow it to make a knowledgeable and informed determination.

(2) Exxon Did Not Prepare And Did Not Offer Any Probative Evidence.

As previously stated, appellees did not know of Exxon's objections until the Emhart settlement hearing of June 2, 1976. Prior to the hearing, Exxon made no attempt to review the record in this case, made no request for discovery, made no request for an extension of time, nor did it prepare any evidence for presentation at the hearing.

This Court has emphasized that an objector to a settlement cannot thwart a settlement by making "unsupported suppositions;" that an objector has to demonstrate a factual basis for its objections. In City of Detroit v. Grinnell Corp., 495 F.2d 448, 464 (2d Cir. 1974), objectors therein appear to have assumed the same attitude as Exxon:

^{33/}This Court has acknowledged the unique character of the facts in Saylor. See Newman v. Stein, 464 F.2d 689, 692, n.8 (2d Cir. 1972).

"In general, the position taken by the objectors is that by merely objecting, they are entitled to stop the settlement in its tracks, without demonstrating any factual basis for their objections, and to force the parties to expend large amounts of time, money and effort to answer their rhetorical questions, notwithstanding the copious discovery available from years of prior litigation and extensive pretrial proceedings."

In Grinnell, the objectors spent four (4) days in the depository examining evidence; the District Court recognized this amount of time was inadequate. 495 F.2d at 464, n.9. In these cases, Exxon has reviewed nothing at all.

In Grinnell, the Court concluded:

"* * *To allow the objectors to disrupt the settlement on the basis of nothing more than their unsupported suppositions would completely thwart the settlement process." 495 F.2d at 464.

Despite this warning, Exxon appeared at both the Emhart and Ilco settlement hearings without any preparation. Objector's counsel admitted that he didn't even know if the 20% allocated to the private class was more than that class was entitled to:

"[Mr. King]: Now, conceivably my clients will get less, conceivably its not 80/20. Your Honor mentioned the term 6 percent or 6 point some odd. We don't know that. But I submit to this Court that there's no evidence before this Court to support that 80/20." [App. (Tr. 58)].

Incredibly, Exxon advanced its objection without

knowing, if sustained, whether it would result in the private class receiving less than 20 percent of the Emhart settlement.^{34/}

In light of the adequate evidence offered by the supporters of the Emhart settlement and the allocation thereof, and in light of Exxon's lack of understanding or concern for the consequences of its objections, the District Court clearly acted within the permissible scope of its discretion in approving the settlements and allocation. The conclusion of the Fourth Circuit in Young v. Katz, 447 F.2d 431, 434-5 (5th Cir. 1971), applies with equal force here:

"In sum, the evidence on behalf of the active plaintiffs clearly establish the reasonableness of the settlement. The evidence offered on behalf of the objectors raised nothing of substance to the contrary. In fact the objectors dealt only with suggested possibilities, supported by no real prospect of ultimate success. Thus, applying the principles discussed supra, no abuse of discretion in the approval of this settlement is shown...."

^{34/}The posture assumed by counsel for Exxon suggests that he is more interested in disrupting this class action than protecting any legitimate interests of his client. Mr. Simon's antagonism to Rule 23 is well documented. E.g., Simon, Class Actions -- Useful Tool or Engine of Destruction, 55 F.R.D. 375 (1972).

IV.

IT WAS PROPER FOR THE DISTRICT COURT TO
APPROVE AN INTERCLASS ALLOCATION AS
PART OF ITS SETTLEMENT DETERMINATION

Objector suggests that no allocation need be made until the end of the litigation. Appellees disagree with that conclusion for several reasons.

First, each class should be informed of the amount of the settlement it will receive prior to approval of the settlement -- how else can each class assess whether they will approve or object to a proposed settlement. The present allocation is intended to distribute to each class (public and private) respectively, approximately 8 percent of Emhart's relevant sales to each.

Secondly, should the remaining defendants eventually settle, it is very possible that while the private class distribution will require claim forms, the public class distribution may be based on demographic statistics or other relevant statistics. Such a method of distribution has been used in other cases^{35/} and substantially decreases

^{35/}State of West Virginia v. Chas. Pfizer and Co., 314 F. Supp. 710 (S.D.N.Y. 1970); City of Philadelphia v. American Oil Co., 53 F.R.D. 45 (D.N.J. 1971) (class decision).

administration costs and expenses. If such procedure is followed, then claim forms could not be the basis for an inter-class allocation, and industry sales statistics would have to be relied upon.

Moreover, it would be inappropriate to require class members to file claim forms now, for the following reasons: (i) because the trial is bifurcated, counsel and the Court will not know what information is to be included on the claim form, i.e., the period for damages will not be determined until after the liability trial; and (ii) the administration of claim forms would be a highly time consuming program and divert plaintiffs' counsel from preparing for trial against the non-settling defendants.^{36/}

Interclass allocations based on relevant statistics rather than claim forms have been an accepted procedure in the courts. In Hartford Hospital v. Chas. Pfizer & Co.,

^{36/}It is ironic, and maybe more than coincidental in light of the "active assistance" Objector received from Eaton, that the non-settling defendants and Exxon took the same position with respect to claim forms, both urging that they be required so that plaintiffs' counsel would be diverted from trial preparation. Plaintiffs vigorously and successfully opposed that position when argued by Eaton and Sargent to the District Court (A337-346, 384-388).

52 F.R.D. 131 (S.D.N.Y. 1971), statistics were used to divide a \$32,500,000 settlement among private hospitals and Blue Cross Plans on a 2/3-1/3 basis, prior to the filing of claim forms. In In re Gypsum Wallboard Cases, 386 F. Supp. 959, 965 (N.D. Cal. 1974), allocation among five classes (including a private builder-owner class and a governmental class) was done by negotiation alone, without any benefit of statistics, and prior to claim forms being filed. See Freeman, Current Issues in Class Action Litigation, 70 F.R.D. 751, 271-274 (1976).

Where, as here, there was adequate evidence in the form of the relevant statistics, the allocation as approved by the Court below was proper and was clearly within its discretion.

V.

THERE WAS NO DISABLING CONFLICT OF CLASS COUNSEL
WHICH AFFECTED THE INTEGRITY OF THE ALLOCATION OF
THE EMHART SETTLEMENT

Exxon has objected to the allocation of settlement on the ground that counsel for the private class is also counsel for the national governmental class. Objector argues that the situation gives rise to a conflict of "loyal-

ties" in counsel for the private class which invalidates the allocation.

Objector's' argument is erroneous for the following reasons: (i) there is no conflict of interest; (ii) assuming arguendo that there was a limited conflict, it did not affect the allocation of the settlement; and (iii) any appearance of conflict was eliminated when the District Court appointed a counsel representing approximately 150 private class members to a committee on behalf of the private class for purposes of allocation and distribution.

(A1028)

A. A Counsel Who Represents Two "Ultimate Purchaser-End User" Classes Has No Conflict Of Interests; The Interests Of The Class Are Common.

Both the public and the private classes are ultimate purchasers and end users of contract hardware. To recover, they seek to prove the identical antitrust violations and the identical effects of these violations on their purchases. For these reasons, two separate district courts (one prior to transfer under 28 U.S.C. §1407) have found that the same counsel adequately represented both the public

and private classes. City of Philadelphia v. Emhart Corp., 50 F.R.D. 232 (E.D. Pa.); recertified in In re Master Key Antitrust Litigation, 70 F.R.D. 23 (D. Conn.), appeal dismissed, 528 F.2d 5 (2d Cir. 1975).

Moreover, representation by one counsel of two or more classes with common interests has been upheld in other cases, including cases in which the Objector herein was a class member and was represented by its present counsel. For example, in City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974), three separate classes (governmental, private industrial and private commercial) were all represented by the same counsel.

Accordingly, there is nothing per se improper when the same counsel represents two or more classes, and settlements achieved in those situations have been approved both by district courts and courts of appeals.

None of the cases relating to settlement approval and cited by Objector (O.B. 40) rejected a settlement on the grounds that one counsel represented more than one class. Moreover the settlements involved in those cases, unlike here, were dispositive of the entire litigation. The cases sub judice are different. Besides the representations of

plaintiffs' co-liaison counsel that the allocation was based upon Emhart's statistics and not arbitrarily negotiated (A684, 740),^{37/} the fact that the cases are proceeding to trial against two non-settling defendants should assure this Court, as it did the District Court, that plaintiffs' co-liaison counsel are proceeding in good faith.

B. The Alleged Limited Conflict Did Not Affect The Allocation Of The Settlement.

As previously set forth, the allocation of settlement between the public and private class was not negotiated, but rather was based upon Emhart statistics of actual sales of the products involved to the respective classes involved. As the Court below stated in approving the allocation:

"...the appearance of such a conflict does not automatically require the disapproval of the settlement, especially in the face of the objective evidence of fairness presented." (A839-40)

No circumstances exist which suggest that the allocation was the product of a conflict. Clearly Objector

^{37/}Objector's references to the Emhart statistics being used as "bootstrap" to support the allocation are unsupported in the record and should be dismissed as argumentative rhetoric.

presented no such evidence. In State of West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079, 1091 (2d Cir. 1971), this Court rejected a similar objection to a settlement allocation as follows:

"...Appellants make several rather vague charges of conflict-of-interest as to various counsel for both the wholesaler-retailer class and the government plaintiffs. The district court specifically found that 'from the affidavits submitted and [from] the Court's knowledge of the progress of these actions, it is clear that the proposed compromise was the result of good faith bargaining at arm's length.' The appellants have suggested nothing of substance which would cast doubt on this conclusion."

It is significant that Judge Blumenfeld has been presiding over these cases for more than five years, that during that time, he has become familiar with plaintiffs' counsel and their responsibility and integrity. This fact was fortified at the settlement hearing by the remarks of Mr. Seymour, representing certain objectors:

"We are aware of the fact that this proceeding has been handled in a model fashion -- not only because of Your Honor's handling of the case, but because of the competence of plaintiffs' liaison counsel, who are well known to us in other litigation as well." (A691).

As stated in Hartford Hospital v. Chas. Pfizer & Co.:

"Counsel to plaintiffs in these actions include lawyers well known to the Court as both able and experienced. This factor is of significance not only as bearing on the results of negotiations with counsel for defendants but also as bearing on the division of the overall settlement...." 52 F.R.D. at 137. [Emphasis added]

In light of the District Court's intimate knowledge of the case and all counsel, the evidentiary basis of the allocation, and Objector's failure to suggest anything of substance to cast doubt on the District Court's conclusion, there exists no basis to reverse the allocation of the settlement.

- C. Any Appearance Of Conflict Was Eliminated When The District Court Appointed A Counsel For Objecting Private Class Members To Serve On A Committee On Behalf Of The Private Class For Purposes Of Allocation And Distribution.

As a result of objections to an alleged conflict of interest or the appearance thereof, the District Court took "steps to remedy the situation" by appointing "additional counsel to assist Mr. Montague in representing the private builder-owner class, and to act under his direction."^{38/} (A839, n.7). This concept was offered by Mr.

^{38/}By Order dated August 11, 1976, the District Court appointed Samuel H. Seymour, Esquire to serve on a Committee of Counsel with Mr. Montague "for the purpose of consulting on behalf of the Private Plaintiff Class on all future issues relating to the allocation of any recoveries among the classes in this litigation and the distribution thereof to the private Plaintiff Class...." (A1028).

Montague at the settlement hearing (A746-7). This apparently satisfied the objections of all objecting claimants other than appellants. Mr. Seymour stated:

"Finally, I am impressed by Mr. Montague's suggestion of willingness to have independent private owner-builder counsel join him as a committee member in future matters of allocation and distribution. I think that helps the class in the future. It certainly helps to remove any question of conflict." (A1028).

Accordingly, any alleged potential conflict involving the allocation of the settlement was removed.

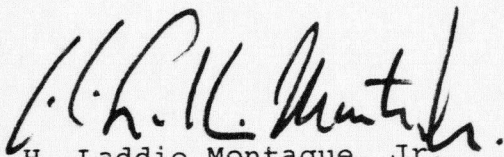
C O N C L U S I O N

In light of the circumstances surrounding this litigation and in light of the evidence and the record before the Court below, the trial court's approval of the Emhart settlement allocation and of the Ilco settlement was clearly within its discretion. The settlements and allocation were reached after extensive pretrial proceedings and discovery and are supported by the overwhelming majority of class members.

The District Court's findings that the Emhart settlement allocation and the Ilco settlement were fair and adequate were supported by adequate evidence and were based

upon a full record and the trial judge's intimate and detailed knowledge of the case. Moreover, the settlement hearings were proper in scope and gave each interested class member ample opportunity to object, be heard and present evidence. During the hearings and in its Opinion, the District Court demonstrates its concern for the protection of the interests of the members of all classes.

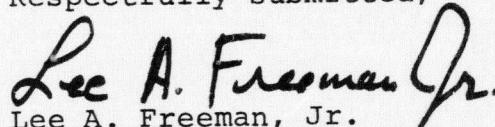
We respectfully submit that the approval of the Emhart settlement allocation and the Ilco settlement should be affirmed.



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Respectfully submitted,



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SUPPLEMENTAL APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

In re:

MASTER KEY ANTITRUST
LITIGATION

M.D.L. Docket
No. 45
[All Cases]

DEPOSITION OF FRANCIS C. DYKEMAN

Los Angeles, California

Tuesday, April 20, 1976

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REPORTED BY:

SYLVIA BECKER, CSR, #2524

DEPO NUMBER: 6-1841

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1 to us in boxes 1 through 7 include all of the reports that
2 your staff prepared for your review?

3 A Yes.

4 Q And what is the one exception?

5 A We are making a study of distributors at the
6 Eaton plant.

7 Q A study of what distributors?

8 A Selected distributors at the Eaton plant in
9 terms of trying to identify sales made to distributors for
10 original sales and extension sales and public and private
11 sales.

12 Q What records are you using to make this study
13 at the Eaton plant?

14 MR. BATES: Let me show an objection at this time.
15 This is, as Mr. Dykeman has already indicated, a study which
16 is not completed, and I believe the scope of the examination
17 should be as to facts or conclusions, and I believe he stated
18 already there have been no conclusions because the study is
19 not completed, so we object to any extensive inquiry into the
20 as-yet uncompleted study.

21 BY MR. FREEMAN:

22 Q What records are you using for the study of
23 distributors that you referred to being made at the Eaton
24 plant?

25 MR. BATES: I think we will instruct him not to answer
26 on that, because it is, as I said, not a proper area of
27 inquiry in that there is nothing by way of work product as
28 yet which has been or can be presented.

1 MR. FREEMAN: I think I am entitled to know the
2 records that he has been furnished to review, Mr. Bates, as
3 called for by the Notice of Deposition and as at least
4 Mr. Sullivan represented to the court would be fully
5 produced for us.

6 MR. BATES: Do you have a copy of the transcript of
7 that hearing?

8 MR. FREEMAN: No, I don't.

9 MR. BATES: Would you like to review a copy in order
10 to substantiate the statement you just made?

11 MR. FREEMAN: No. I don't need to at this time,
12 Mr. Bates. You simply are saying you will not tell us at
13 this time what materials have been furnished to Mr. Dykeman
14 for his review?

15 MR. BATES: I am stating that as I understand the
16 scope of the rule under which you are proceeding, you are
17 free to inquire as to facts in the possession of this witness
18 and any conclusions which he has drawn, and I am saying that
19 the study which you are now inquiring into is not a
20 completed study. There are no conclusions, and so we will
21 object to any inquiry at all as respects that.

22 BY MR. FREEMAN:

23 Q Mr. Dykeman, what facts do you have in your
24 possession that relate to the study being made in North
25 Carolina?

26 A We have a very preliminary listing of sales to
27 distributors in terms of quantities only and the number of
28 times sales have been made to distributors.

June 18, 1976

G. Joseph King, Esquire
Howrey & Simon
1730 Pennsylvania Avenue, N.W.
Washington, DC 20006

RE: Master Key Antitrust Litigation
MDL Docket No. 45

Dear Mr. King:

I am responding to your letter of June 16 in accordance with your paragraph numbers:

1. I have asked Lee Freeman to send to Mr. Seymour all the financial material relating to Ilco which is in our possession. Mr. Seymour will make it available to you. This material was reviewed by both Mr. Freeman and myself prior to reaching the proposed settlement with Ilco.
2. I cannot assure you anything about expenses and fees, since as you well know, any award of expenses and fees must be approved by the Court. Therefore your second request is irrelevant. You will have your chance to object to fees and expenses, as you have in both the Lindy Bros. and Grinnell cases.
3. You will be served with papers supporting the settlement in due course along with all other attorneys who have asked to be served.
4. I am enclosing a copy of the legal memorandum prepared by Ilco's counsel concerning their relationship with Unican.

G. Joseph King, Esquire
June 18, 1976
Page Two

5. I have already forwarded to you a copy of the settlement agreement with Ilco. I will not send you any drafts of the proposed settlement, since they constitute work product.

With respect to your last request, there is no City of Detroit action in this case. I am enclosing a copy of the Complaint in the Amherst Leasing action.

With respect to footnote 1 in your letter of June 16, you might recall that plaintiffs' liaison counsel did not even know that you were objecting to the Emhart Settlement or intending to appear, since you apparently hand filed your written notice of intention directly with the Clerk of the District Court and you failed to follow the instructions in the Notice *and* to serve plaintiffs' liaison counsel with a copy thereof.

Sincerely yours,

H. Laddie Montague, Jr.

HLM, Jr./mem
Enclosures

cc: Clerk, United States District Court
for the District of Connecticut
Lee A. Freeman, Jr., Esquire
Samuel H. Seymour, Esquire

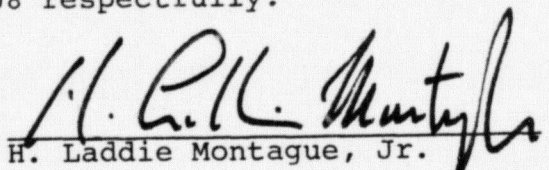
IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 76-7356

IN RE:	:	M.D.L. DOCKET NO. 45
	:	
MASTER KEY ANTITRUST	:	ALL CASES
LITIGATION	:	

CERTIFICATE OF SERVICE

H. LADDIE MONTAGUE, JR., hereby certifies that on August 24, 1976, he served the Brief of Appellees-Plaintiffs upon Appellants-Objectors by delivering two copies thereof by express messenger service upon G. Joseph King, Esquire, Howrey & Simon, 1730 Pennsylvania Avenue, N.W., Washington, DC 20006 and upon Appellees Emhart Corporation and Ilco Corporation by mailing first class, postage prepaid, two copies to Richard M. Reynolds, Esquire, Day, Berry & Howard, One Constitution Plaza, Hartford, Connecticut 06103 and to Charles Donelan, Esquire, Bowditch & Lane, 311 Main Street, Worcester, Massachusetts 01608 respectfully.


H. Laddie Montague, Jr.

DATED: August 24, 1976